Docket No 09-405

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

UNITED STATES ex rel. DARIAN

Plaintiff-Petitioner,

vs.

ACCENT BUILDERS, INC., et al.

Defendants-Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR REHEARING

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QUESTIONS PRESENTED FOR REVIEW

1. Is the United States a plaintiff in all False Claims Act actions thereby allowing a Qui Tqm Relator 60 days from final order to file an appeal?

LIST OF ALL PARTIES TO PROCEEDINGS BELOW

UNITED STATES OF AMERICA *ex rel.* DARIAN

Plaintiff-Petitioner,

vs.

UNITED STATES OF AMERICA

Plaintiff

vs.

STATE OF CALIFORNIA, CALIFORNIA DEPARTMMENT OF PARKS AND RECREATION, CALIFORNIA DEPARTMENT OF GENERAL SERVICES, CALIFORNIA CONTRACTORS STATE LICENSE BOARD, CALIFORNIA OCCUPATIONAL SAFTEY AND HEALTH

ADMINISTRATION, CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, JUDICIAL COUNCIL OF CALIFORNIA, LOS ANGELES SUPERIOR COURT, LOS ANGELES SUPERIOR COURT SANTA MONICA, LOS ANGELES COUNTY SANITATION DISTRICT #2, LOS ANGELES COUNTY DISTRICT ATTORNEY, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, MALIBU LOST HILLS DIVISION, LAS VIRGENES MUNICIPAL WATER DISTRCT, CITY OF MALIBU, PEPPERDINE UNIVERSITY, GOVERNOR GRAY DAVIS, CALIFORNIA ATTORNEY GENERAL BILL LOCKYER, HONORABLE PATRICIA COLLINS, HONORABLE LAWRENCE MIRA, COMMISSIONER TERRY ADAMSON, RUSTY AREIAS, REGINALD DEMERY,IAN GAVINE, DAVE PETTWAY, TIM LA FRANCHI, TARA TODD, DARLENE ATKINSON, DOUGLAS WITT, TOM CARVER, GARY STEVENS, RICHARD BARTON, C. LANCE BARNETT, MIKE BROWN, PAM ALBERTI, MARIANE HENKEL, GLORIA R. LANGLEY, JANEECE R. HARDS, BILL SIENER, RENE GARCIA, DENNIS DICKERSON, WENDY PHILLIPS, LEROY BACA, MARTIN L. HERSCOWITZ, MIKE WILSON, ALLYSON KIMMEL, MARNA MILLER, JOHN O'BRIEN, THOM BRADSTOCK, PAT MAY, ERNESTO MASSONE, DON WIPPERT, CHRISTI HOGIN, JAMES COLBAUGH, WAYNE K. LEMIEUX, PHIL E. PHILLIPS, AMERICAN INTERNATIONAL COMPANIES, AMERICAN INTERNATIONAL GROUP, NATIONAL UNION FIRE INSURANCE OF PITTSBURGH INC., MALIBU BAY CO., LAMBERSON KOSTER & CO., INTERNATIONAL HARDWOODS, SUPERIOR GUNITE INC., ACCENT BUILDERS INC., FYFE CO. INC., FIBRWRAP CONSTRUCTION CO. INC., DCA DRILLING AND CONSTRUCTION INC., HALCO SERVICE CORP., BOOKOUT PLUMBING INC., ARROW SECURITY, A. JEROLD PERENCHIO, ANTHONY

LAWRENCE FEDERICO, RONALD RAY FEDERICO, ED N. FYFE, HEATH CARR, HAROLD ORUM, HAROLD BOOKOUT, ROBERT G. KELLY, SUSAN GANNUSCIO, DON ROBINSON, DOES 1-10

Defendants-Respondents.

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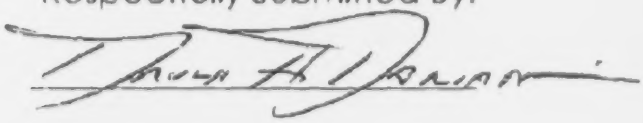
CORPORATE DISCLOSURE STATEMENT

Appellant, Relator Bruce Darian owner of Darian Construction Co. is a sole proprietorship.

DATED: January 2, 2010

Respectfully Submitted By:



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VI

STATEMENT OF JURISDICTION

Relator has filed his Petition for Rehearing within 25 days from the Court's December 7, 2009 Orders denying the Petitions For Writ of Certiorari review. Docket Numbers 09-405 and 09-406.

VII

STATEMENT OF THE CASE

On June 8, 2009 this Court issued a ruling in United States ex rel. Eisenstein v. City of New York , Et. Al. 129 S. Ct. 2230: 173 L. Ed. 2d. 1255; 2009 U.S. LEXIS 4316. (2009).affirming the second circuit's order establishing that the United States is not a Plaintiff and a party to a Qui Tam False Claims Act action. This ruling is of substantial importance and is intervening to both of Relator's related case in

docket numbers 09-405 and 09-406. Under this finding by the Court, Relator's cases are barred because of a Jurisdictional issue by not filing both appeals within 30 days from final order. However well settled ninth circuit authority for a Qui Tam action recognizes the United States as a party and the filing of an appeal was 60 days from final order.

VIII

INTRODUCTION

Relator brings this Petition for Rehearing on an essential and important issue as to whether the United States is a Plaintiff and party to a False Claims Act action when it is filed and subsequently conducted by the Relator. This important issue is national in scope and goes to

the heart of the False Claims Act. It establishes the President's ability to prosecute the laws of the United States under Article II of the Constitution. How Congress has the right to enact the laws of the United States under Arlicle I of the Constitution, and for the Judiciary to accurately interpret the laws as written to uphold the balance of power in our tripartite government.

Congress' intention taken as a whole has been to allow the President to enlist the help of the citizenry thereby deputizing them to act as a "posse" to recover the United States' money and that of no one else.

IX

STATEMENT OF FACTS

Relator filed two Petitions for Writ of Certiorri from two Ninth Circuit cases deriving from one U.S. District Court case from the Central District in California filed on September 21, 2000 under the False Claims Act. This Court on December 7, 2009 denied both Petitions docket numbers 09-405 and 09-406.

X

SUMMARY OF ARGUMENT

The United States is the Plaintiff and Party to all False Claims Act actions thereby allowing the President to prosecute the laws of the United States under his U.S. Constitution Article II authority. Relator's partial and supervised statutory right to prosecute the action with the Executive's oversight goes back to the founding of this Country and

history shows that it started well before the thirteenth century. By the latin words " "qui tam pro domino rege quam pro se imposo sequitur," which is interpreted as "who brings the action as well for the king as for himself." The very Latin words themselves explain that Qui Tam is for the King and the person.

XI

ARGUMENT 1

Is the United States a plaintiff in all False Claims Act actions thereby allowing a Qui Tam Relator 60 days from final order to file an appeal?

The Supreme Court has established that [HN10] where an act of Congress arguably threatens the integrity of another branch's authority and independence, the proper separation of powers inquiry is whether Congress has "impermissibly undermined" the role of that branch. *Schor*, 478 U.S. at 856. This is the test which we apply to the

qui tam provisions of the FCA. In other [*751] words, we must consider whether the qui tam provisions "'disrupt[] the proper balance between the coordinate branches [by] preventing the Executive Branch from accomplishing its constitutionally assigned functions.'" *Morrison*, 487 U.S. at 695 (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443, 53 L. Ed. 2d 867, 97 S. Ct. 2777 (1977)). [**24] To determine whether the qui tam provisions undermine the role of the Executive Branch, we must decide whether, within the meaning expressed in *Morrison*, these provisions accord the Executive Branch "sufficient control" over the conduct of relators to "ensure that the President is able to perform his constitutionally assigned duties." [6] *Morrison*, 487 U.S. at 696, 101 L. Ed. 2d 569, 108 S. Ct. 2597.

> For purposes of this case, the relevant presidential duty is to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

The authority most analogous to this case is *Morrison v. Olson*, in which the Supreme Court held that the independent counsel provisions of the Ethics in Government Act do not impermissibly interfere with the functions of the Executive Branch in violation of the separation of powers principle. 487 U.S. at 697. *Morrison* provides a baseline against which we may assess whether Congress has unconstitutionally diminished [**25] executive power by permitting private plaintiffs to sue in the name of the United States for an injury to the

federal treasury. Comparison to *Morrison* is particularly useful because that case considers the degree to which Congress may assign prosecutorial powers to persons not under the direct control of the Executive Branch. prosecute violations of law. [7] It is clear to us that no such absolute rule exists. *Morrison* itself indicates otherwise because that decision validated the independent counsel provisions of the Ethics in Government Act even though it recognized that "it is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." 487 U.S. at 695. The Court also stated in *Morrison* that "there is no real dispute that the functions performed [**26] by the independent counsel are 'executive' in the sense that they are law enforcement functions that *typically* have been undertaken by officials within the Executive Branch." 487 U.S. at 691 (emphasis added). Use of the word "typicaliy" in that sentence, considered in light of the Court's ultimate conclusion upholding the independent counsel provisions, must mean that prosecutorial functions need not *always* be undertaken by Executive Branch officials. See Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 Yale L.J. 1069, 1070 (1990) (Framers intended that prosecution would be undertaken by but not constitutionally assigned to executive officials, and that such officials would typically but not always prosecute). Thus, we reject Boeing's

assertion that *all* prosecutorial power of any kind belongs to the Executive Branch.

The Court in Kelly v. Boeing identified all possible means of executive control in a qui tam action to that identified in an Ethic in Government Act action as determined in Morrison v. Olson 487 U.S. at 696.

Morrison identifies several means by which the Executive Branch can control an independent counsel's exercise of the powers outlined above. First, no independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request an appointment is unreviewable. Second, the Attorney General retains the power to remove an independent counsel, though only upon a showing of "good cause." The Act requires the Attorney General to submit a report to the Judiciary Committees of the House and the Senate and to a special court responsible for appointing independent counsels specifying the grounds for removal. *Morrison*, 487 U.S. at 663 (citing 28 U.S.C. § 596(a)(2)). The Attorney General's removal authority is further limited by the Act's provision that an independent counsel can obtain judicial review of the Attorney General's removal action by filing a civil suit. The Act authorizes the reviewing

court to grant reinstatement or "other appropriate relief." *Id.* at 663-64 (citing 28 U.S.C. § 596(a)(3)).

Third, the independent counsel's "jurisdiction" is defined with reference to the facts submitted by the Attorney General upon requesting an appointment. However, it is the special court charged with appointing an independent counsel that actually defines the counsel's prosecutorial jurisdiction. *Id.* at 661 (citing 28 U.S.C. § 593(b), 679. [9] Finally, the Act requires the counsel to abide by Department of Justice policies, unless it is not possible to do so. *Morrison*, 487 U.S. at 696. The Court concluded that these features give the Executive Branch "*sufficient control* over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." *Id.* (emphasis added). We note that the Court reached this conclusion despite the fact that the Attorney General's unreviewable discretion to request appointment of an independent counsel is the only unconditional means of executive control which the Ethics in Government Act provides.

The President has the power to control a False Claims Act by his ability in the Executive Branch to intervene and take primary charge for prosecution although not absolute. He case move for dismissal of the case and can seek a stay of the Relator's

discovery. The Executive can seek any other manner to settle an action.

It is well settled that the Court must approve the government's decision to terminate a case brought on behalf of the United states U.S. ex rel. Troung v. Northrop Corp. 728 F. Supp. 615, 622 (C.D. 1989; U.S. ex rel. Stillwell v. Hughes Helicopters Inc. 714 F. Supp. 1084, 1093 (C.D. Cal. 1989).

The Attorney General can only suggest to a court to terminate an independent counsel as the Morrison court held, but under the FCA he can provided relator is entitled to a hearing 31 U.S.C. 3730©(2)(A).

The Morrison court found that even with the Executive's control over an independent counsel there is a reduced control the Attorney General

has and through him the President exercises Morrison, 487 U.S. at 695. The Kelly court found that the Executive Branch exercises at least the same amount of control in an FCA action giving it sufficient means of controlling or supervising relators to satisfy separation of powers concerns. These findings would be meaning less if it is not true that the United States is always a party to an FCA action.

In addition to considering whether the Ethics in Government Act taken as a whole violates the separation of powers principle, the Court in *Morrison* also specifically addressed whether the provision of the Act restricting the Attorney General's [**39] power to remove an independent counsel, taken by itself, impermissibly interferes with the President's exercise of his functions. 487 U.S. at 685. The Court held in *Morrison* that the "good cause" restriction on the Attorney General's power to remove an independent counsel does not violate separation of powers. *Id.* at 693. The essence of the Court's removal analysis in *Morrison*, based on its interpretation of prior removal jurisprudence, is an inquiry into whether Congress has impermissibly encroached on executive power

by limiting presidential removal authority. *Id.* at 685-93. *See also Bowsher v. Synar*, 478 U.S. 714, 726, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986) ("Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws."). The Court found no such encroachment evident in the independent counsel provisions. *Morrison*, 487 U.S. at 691.

In light of the attention paid to the removal issue in *Morrison*, we have considered whether the lack of a provision permitting the government to "remove" a relator invalidates [**40] the qui tam provisions. [HN12] Short of dismissing a qui tam action, the government can only seek *limitation* of a relator's participation in a case. 31 U.S.C. § 3730 (c)(2)(C). However, the concept of removal does not make sense in the qui tam context, in which there is no "office" from which to remove the relator and subsequently fill with someone else. *Cf. Morrison*, 487 U.S. at 664 (discussing procedures for terminating the "office" of an independent counsel). In contrast to independent counsels, relators are not replaceable. *Cf. id.* at 662 n. 5 (special court which appoints independent counsels authorized under 28 U.S.C. § 593(e) to fill vacancies due to death, resignation or removal of an independent counsel). The only practicable way to "remove" a relator is to end the qui tam litigation -- and this the government has power to do. While the government's power to end qui tam litigation is qualified, so is the government's power to remove an independent counsel; [16] thus, these aspects of the two Acts are not meaningfully distinguishable for purposes [**41] of separation of powers analysis. Kelly v. Boeing 9 F .3d at 760

Judicial Encroachment.

We have discussed in the preceding the central separation of powers issue presented to us in this appeal -- that is, whether Congress has impermissibly undermined the role of the Executive Branch by permitting private parties to exercise some measure of prosecutorial authority. We must also resolve a distinct, but in this case less difficult, separation of powers [**42] problem: whether the qui tam provisions disrupt the proper balance of power between the three branches by permitting the Judicial Branch to encroach [*756] on executive authority. We recognize the general rule that [HN13] under Article III, courts may not exercise "executive or administrative duties of a nonjudicial nature." *Buckley*, 424 U.S. 1 at 123, 46 L. Ed. 2d 659, 96 S. Ct. 612. The purpose of this rule is "to maintain the separation between the Judiciary and the other branches of the Federal Government by ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches." *Morrison*, 487 U.S. at 680-81.

In light of *Morrison*, we believe it is not dispositive that no direct analogue exists for judicial authority to determine whether the government has demonstrated good cause to take over a case prosecuted in the name of United States. [18] This power may affect the government's prosecutorial discretion to some degree, but it does not amount to the power to supervise the prosecutorial conduct of either the

Attorney General or a relator. Cf. *Morrison*, 487 U.S. at 681 ("The Act simply does not give the [special court] the power to 'supervise' the independent counsel in the exercise of his or her investigative or prosecutorial authority.") By comparison, we note that *Morrison* approved a scheme in which the Attorney General relinquishes *all* unqualified prosecutorial discretion with respect to a matter referred to an independent counsel once he or she has [*757] decided to request appointment of a counsel. Moreover, *Morrison* specifically held that the provision that the Attorney General must show "good cause" to remove an independent counsel and that the removal decision is subject to judicial review does not offend constitutional principles by permitting excessive [**46] judicial involvement. *Id* at 691.

The kelly court found in looking at the case in Schor, 478 U.S. at 851 and under Article III of the Constitution that the False Claims Act does not authorize the judiciary to infringe on the authority to the degree beyond that established in Morrison, to be able to intervene.

Taken as a whole, and considering the removal issue in particular, the FCA affords the Executive

Branch a degree of control over qui tam relators that is not distinguishable from the degree of control the *Morrison* Court found the Executive Branch exercises over independent counsels. Therefore, we conclude that the qui tam provisions of the FCA do not "impermissibly interfere" with the President's exercise of his constitutionally assigned duties. Nor do the provisions disrupt the "proper balance" between the branches, because, like the Ethics in Government Act, the FCA permits the Executive Branch to retain "sufficient control" over prosecutorial functions. [19] Finally, the provisions do not authorize constitutionally impermissible judicial encroachment on executive power. Kelly v. Boeing 9 F .3d at 760

But in the FCA context, Congress has created a scheme in which the interests of the private prosecutor (that is, the relator) coincide with the public interest in remedying harm to the federal treasury. Under the explicit terms of the Act, a qui tam action is taken on behalf of *both* the government and the relator, indicating that the two share a single interest in successful litigation. *See* 31 U.S.C. § 3730 [**57] (b). Indeed, the only private interest at stake in a qui tam action is the interest which Congress has created in a reward for successful prosecution; thus the public's interest in successfully enforcing the FCA and the relator's private interest are intertwined rather than conflicting. Kelly v. Boeing 9 F .3d at 765

XII

STANDARD OF REVIEW

[HN3] We review de novo the purely legal question whether a statute is constitutional. *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1567 (9th Cir. 1993). We are mindful that we should invalidate an act of Congress only "for the most compelling constitutional reasons." *Mistretta v. United States*, 488 U.S. 361, 384, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989) [**11] (quoting *Bowsher v. Synar*, 478 U.S. 714, 736, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986) (Stevens, concurring in judgment)). Furthermore, we recognize that we are obliged whenever "fairly possible" to interpret a statute in a manner that renders it constitutionally valid. *Communications Workers of America v. Beck*, 487 U.S. 735, 762, 101 L. Ed. 2d 634, 108 S. Ct. 2641 (1988). Our

adherence to this principle of presumptive constitutionality is guided by our understanding that "when we are required to pass on the constitutionality of an Act of Congress, we assume 'the gravest and most delicate duty that this Court is called on to perform.'" *Fullilove v. Klutznick*, 448 U.S. 448, 472, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980) (citation omitted).

XIII

CONCLUSION

Relator respectfully requests that the Court hear this case as it's prior ruling from the second circuit's case is bad law and should be reversed.

"Let us have faith that right makes might"

--Abraham Lincoln

DATED: January 2, 2010

Respectfully Submitted By:

BRUCE H. DARIAN, Pro Per
P.O. Box 42
Hollywood, CA 90078

By _____
United States of America ex rel. Darian

XIV

STATEMENT OF RELATED CASES

Appellant certifies that there is a known related Petition for Rehearing pending in the Supreme Court. Docket No. 09-406

CERTIFICATE OF COMPLIANCE

UNITED STATES OF AMERICA ex rel. DARIAN

Plaintiff-Petitioner,

vs.

UNITED STATES OF AMERICA

Plaintiff

vs.

STATE OF CALIFORNIA, CALIFORNIA DEPARTMMENT OF PARKS AND RECREATION, CALIFORNIA DEPARTMENT OF GENERAL SERVICES, CALIFORNIA CONTRACTORS STATE LICENSE BOARD, CALIFORNIA OCCUPATIONAL SAFTEY AND HEALTH ADMINISTRATION, CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, JUDICIAL COUNCIL OF CALIFORNIA, LOS ANGELES SUPERIOR COURT, LOS ANGELES SUPERIOR COURT SANTA MONICA, LOS ANGELES COUNTY SANITATION DISTRICT #2, LOS ANGELES COUNTY DISTRICT ATTORNEY, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, MALIBU LOST HILLS DIVISION, LAS VIRGENES MUNICIPAL WATER DISTRCT, CITY OF MALIBU, PEPPERDINE UNIVERSITY, GOVERNOR GRAY DAVIS, CALIFORNIA ATTORNEY GENERAL BILL LOCKYER, HONORABLE PATRICIA COLLINS, HONORABLE LAWRENCE MIRA, COMMISSIONER TERRY ADAMSON, RUSTY AREIAS, REGINALD DEMERY,IAN GAVINE, DAVE PETTWAY, TIM LA FRANCHI, TARA TODD, DARLENE ATKINSON, DOUGLAS WITT, TOM CARVER, GARY STEVENS, RICHARD BARTON, C. LANCE BARNETT, MIKE BROWN, PAM ALBERTI, MARIANE HENKEL, GLORIA R. LANGLEY, JANEECE R. HARDS, BILL SIENER, RENE GARCIA, DENNIS DICKERSON, WENDY PHILLIPS, LEROY BACA, MARTIN L. HERSCOWITZ, MIKE

WILSON, ALLYSON KIMMEL, MARNA MILLER, JOHN O'BRIEN, THOM BRADSTOCK, PAT MAY, ERNESTO MASSONE, DON WIPPERT, CHRISTI HOGIN, JAMES COLBAUGH, WAYNE K. LEMIEUX, PHIL E. PHILLIPS, AMERICAN INTERNATIONAL COMPANIES, AMERICAN INTERNATIONAL GROUP, NATIONAL UNION FIRE INSURANCE OF PITTSBURGH INC., MALIBU BAY CO., LAMBERSON KOSTER & CO., INTERNATIONAL HARDWOODS, SUPERIOR GUNITE INC., ACCENT BUILDERS INC., FYFE CO. INC., FIBRWRAP CONSTRUCTION CO. INC., DCA DRILLING AND CONSTRUCTION INC., HALCO SERVICE CORP., BOOKOUT PLUMBING INC., ARROW SECURITY, A. JEROLD PERENCHIO, ANTHONY LAWRENCE FEDERICO, RONALD RAY FEDERICO, ED N. FYFE, HEATH CARR, HAROLD ORUM, HAROLD BOOKOUT, ROBERT G. KELLY, SUSAN GANNUSCIO, DON ROBINSON, DOES 1-10

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains (2,997) words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 2, 2010

BRUCE H. DARIAN

CERTIFICATION OF PETITIONER

Petitioner certifies that this Petition is presented in good faith and not for delay. The grounds for this Petition for Rehearing are limited too intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 2, 2010

BRUCE H. DARIAN